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No. 83-563

ALEXANDER L STEVAS,
CLERK**In the Supreme Court of the United States**

OCTOBER TERM, 1983

HENRY S. BRANSCOME, INC., ET AL., PETITIONERS*v.***UNITED STATES OF AMERICA**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence that highway contractors in a bidrigging conspiracy had made substantial annual out-of-state purchases of asphalt cement to be used in the paving of highways was sufficient to prove the interstate commerce element of a Sherman Act offense where it was undisputed that asphalt cement was used on the highways involved in the bidrigging conspiracy.
2. Whether evidence that highway contractors had rigged bids to resurface highways that carried a substantial volume of interstate traffic was admissible to prove the interstate commerce element of a Sherman Act violation.
3. Whether the jury was correctly instructed that it could consider whether "the highways, secondary roads and streets involved" in a highway repaving bidrigging case are "part of our network of interstate travel and commerce" in determining whether the interstate commerce requirement of the Sherman Act is satisfied.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a), is reported at 711 F.2d 570. The memorandum order of the district court (Pet. App. 11a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1983. A motion for rehearing was denied on August 5, 1983 (Pet. App. 10a). The petition for a writ of certiorari was filed on October 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Henry S. Branscome and Henry S. Branscome, Inc., were indicted with Basic Construction Company and David M. Howell,¹ in the Eastern District of Virginia for conspiring to rig bids on highway surface paving contracts in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The indictment charged that the defendants and others had allocated among themselves paving contracts let by the Commonwealth of Virginia in the Peninsula area² in April 1978.

2. The evidence at trial showed that, through a series of meetings and telephone conversations, the four codefendants had conspired with personnel of two other construction companies to allocate four of the highway resurfacing contracts let by the Commonwealth of Virginia in the Peninsula area in April 1978. As part of the conspiracy, petitioner Henry S. Branscome paid John Blakemore, a competitor, approximately \$18,000 for allowing Branscome to win a particular project allocated by the conspiracy (C.A. App. 200, 204-205). Petitioners and Basic Construction Company were convicted by a jury on February 26, 1982.³

¹ Howell was tried separately and convicted on December 9, 1981. He did not appeal his conviction.

² The Peninsula area lies in and around Hampton, Newport News, and Williamsburg, and includes the counties of James City, York, Gloucester, Middlesex and Mathews (C.A. App. 19).

³ Basic Construction Company was fined \$450,000. Henry S. Branscome, Inc., was fined \$225,000. Henry S. Branscome was fined \$18,000 and was sentenced to one year's imprisonment, with all but 120 days suspended.

The court of appeals affirmed (Pet. App. 1a-9a). The court's opinion was devoted primarily to rejecting arguments made by Basic Construction Company regarding the jury charge on corporate criminal liability and the trial court's rulings on the admissibility of certain evidence.⁴ Although petitioners argued that the trial court erred in admitting evidence of the conviction of co-defendant Howell, the court of appeals held that the admission was not reversible error. The court did not discuss the issues petitioners raise before this Court beyond stating that it found these and other "assignments of error * * * to be without merit" (Pet. App. 9a).

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners contend (Pet. 10-19) that there is a conflict among the courts of appeals concerning the proper interpretation of this Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980).⁵ They then argue that the district

⁴ On October 31, 1983, this Court denied Basic's petition for certiorari seeking review of these claims (No. 83-272).

⁵ *McLain* involved an alleged conspiracy among real estate firms, brokers and trade associations to control residential real estate prices by, *inter alia*, fixing commission rates. This Court reversed the dismissal of the complaint, holding that it is not necessary to demonstrate that the unlawful activity itself exerts an effect on interstate commerce to support Sherman Act jurisdiction. Rather, jurisdiction is established if the

court made evidentiary rulings that were contrary to what they contend is the correct interpretation of *McLain*. Petitioners argue that under a correct interpretation of *McLain*, the evidence with respect to the interstate commerce element of the offense was insufficient and that they should have been acquitted.

The court of appeals, however, did not address petitioners' contentions concerning *McLain*. Nor did it acknowledge the alleged conflict or even suggest that it was adopting any particular interpretation of *McLain*. There was no need for the court to consider

defendant's activities exert a substantial effect on interstate commerce (444 U.S. at 242-243) (emphasis added) :

To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. *Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful.*

This Court reasoned that no other result was possible, since even a conspiracy that fails to have *any* anticompetitive effect is condemned by the Sherman Act. 444 U.S. at 243. See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-225 n.59 (1940).

Petitioners contend that after *McLain*, courts have disagreed on whether the interstate commerce element of a Sherman Act offense may be proved by evidence relating to all the conspirator's business activities or whether such evidence must be limited to the illegal activity—here, the contracts actually rigged. Compare *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir.), cert. denied, 449 U.S. 869 (1980), with *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980). Petitioners believe (Pet. 13-14) that the court in *Western Waste* incorrectly interpreted *McLain*.

this issue because, as petitioners concede (Pet. 17 n.12), the jury was given instructions requested by petitioners embodying what they contend is the correct interpretation of *McLain*. The jury was thus directed to consider "whether the bid rigging conspiracy alleged in the case has been shown as a matter of practical economics to have not an insubstantial effect on the interstate commerce involved" (C.A. App. 360).⁶ Since the jury was given the instructions petitioners requested, this case is not an appropriate vehicle for determining whether some other court has adopted an erroneous interpretation of *McLain*.

Petitioners' contention that the evidence in the record concerning interstate commerce is insufficient when viewed under what they contend is the correct interpretation of *McLain* does not warrant review by this Court. The jury in this case must be presumed to have determined the interstate commerce issue according to the district court's instructions concerning this issue. *Watkins v. Sowders*, 449 U.S. 341, 347 (1981). As we have noted, the court's instructions incorporated petitioners' interpretation of *McLain*. Thus, the jury's guilty verdict reflected its determination that even under petitioners' interpretation of *McLain*, the evidence was sufficient to prove the interstate commerce element of the offense. The court of appeals affirmed the verdict and thus rejected petitioners' contention that the evidence was insufficient. This Court does not ordinarily review factual find-

⁶ The jury was also told that "[t]he government has attempted to prove that the defendants' local activities had a not insubstantial effect on interstate commerce by showing that a not insubstantial amount of liquid asphalt used in the resurfacing work at issue here was in fact manufactured outside the State of Virginia" (C.A. App. 360).

ings that have been affirmed on appeal. *Graver Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967).

In any event, the evidence was sufficient to prove the interstate commerce element of the offense.⁷ At trial, the government introduced evidence that liquid asphalt cement, which the petitioners use in repaving highways, is not produced or refined in the state of Virginia (C.A. App. 82, 122). Witnesses from two asphalt-refining companies testified that the asphalt cement they sold to the conspirators is shipped into Virginia from other states, undergoes no transformation or addition of ingredients, and is in fact in the

⁷ Indeed, before trial Basic Construction Co., petitioners' co-defendant, had offered to stipulate that interstate commerce had been established (C.A. App. 78). Moreover, that petitioners' activities are subject to the Sherman Act is hardly surprising. "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements * * *." *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944). The power Congress possesses under the Commerce Clause is substantial. For example, it reaches the farmer who grows wheat and bakes his own bread, because even this wholly intrastate activity can affect interstate commerce. If the farmer did not grow his own wheat, he would buy bread in interstate commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942). Similarly, it reaches the service of small family-owned restaurants and motels because they may obtain food from out-of-state or serve interstate travelers. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Thus, given the scope of the Commerce Clause, petitioners' out-of-state purchases of substantial amounts of asphalt cement, a portion of which was then used on projects that had been allocated to them as a result of an illegal bid-rigging conspiracy, is sufficient to subject their activities to the Sherman Act.

same physical state in which it travelled in interstate commerce at the time of sale (C.A. App. 83, 123). Each witness testified and produced exhibits showing sales of out-of-state asphalt to the conspirators totaling almost \$6.5 million for the year 1978 (C.A. App. 86-87, 124-126; GX 60, 61).⁸ Government exhibits also demonstrated that the four contracts rigged in this conspiracy involved approximately 29,000 tons of asphalt concrete (GX 7A, 8C, 9D, 9E) which is composed of asphalt cement shipped in interstate commerce, sand and crushed stone (Tr. 923).⁹

⁸ The effect on interstate commerce must be measured with reference to the entire conspiracy and not just from petitioners' activities alone. *United States v. Foley*, 598 F.2d 1323, 1328 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States v. Wilshire Oil Co.*, 427 F.2d 969, 974 (10th Cir.), cert. denied, 400 U.S. 829 (1970). Thus, reference to the asphalt purchases made by all the conspirators is proper.

⁹ Despite this evidentiary showing, petitioners contend (Pet. 17 n.12) that "there was *no evidence* from which the jury could have found an effect on the interstate market for AC-20 [asphalt cement] caused by the activities placed in issue by the indictment" (emphasis in original). Petitioners' argument would appear to fly in the face of this Court's holding in *McLain* that a plaintiff need not demonstrate that the unlawful activity itself affected interstate commerce, since even a failed conspiracy (which can exert no effect on interstate commerce) is condemned by the Sherman Act. *McLain*, 444 U.S. at 242-243. Moreover, petitioners' argument is founded on the misconception that only evidence concerning the interstate effect of the four rigged contracts is admissible or relevant on the interstate commerce element of the offenses. Contrary to petitioners' arguments, the government is not required to show the exact dollar amount of interstate commerce involved. *McLain*, 444 U.S. at 243. The government need only adduce evidence from which the factfinder may infer a substantial effect on interstate commerce. The evidence presented here was admissible and sufficient for that purpose.

Petitioners apparently believe that, as a matter of law, the dollar amount of out-of-state asphalt purchases involved in their bidrigging conspiracy could not have had a substantial effect on interstate commerce. But findings of a substantial effect on interstate commerce have been based on out-of-state purchases worth far less than those involved in this case. See *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1261 (7th Cir.), cert. denied, 423 U.S. 874 (1975) (out-of-state purchases totalling \$9,307). See also *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 539 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979) (purchase of \$10,000 worth of out-of-state supplies and provision of \$26,000 worth of medical services to out-of-state patients supported Sherman Act jurisdiction).¹⁰ Therefore, the evidence

¹⁰ Petitioners also imply (Pet. 18 n. 13) that it was necessary for the government to produce evidence at trial detailing the manner in which petitioners' bidrigging conspiracy would affect the market in liquid asphalt, a necessary ingredient in highway repaving. But the government is not required to prove that the conspirators' activities *actually* affected interstate commerce. *McLain*, 444 U.S. at 243-244; *Cordova & Simonpietri Insurance Agency, Inc. v. Chase Manhattan Bank*, 649 F.2d 36, 45 (1st Cir. 1981) (government need only prove that "it is logical, as a matter of practical economics, to believe that the unlawful activity will affect interstate commerce"). Moreover, the Sherman Act does not require the government to prove what is obvious as a matter of economics with mathematical data. Accord, *United States v. Azzarelli Construction Co.*, 612 F.2d 292, 296-297 (7th Cir. 1979), cert. denied, 447 U.S. 920 (1980) (court of appeals found that bidrigging conspiracy among highway contractors diminished the state funding available for highway construction, although no evidence to support this logical conclusion was presented at trial); *United States v. Finis P. Ernest, Inc.*, 509 F.2d at 1261 (court of appeals found that bidrigging conspiracy involving

in this case was sufficient to prove the interstate commerce element of the offense.

2. The government also presented evidence at trial showing that the roads affected by the bidrigging conspiracy carried a substantial amount of interstate traffic. Petitioners contend (Pet. 19-24) that this evidence should have been excluded under this Court's decision in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). To the extent that the trial court's instructions referred to interstate traffic, petitioners argue that they are contrary to this Court's holding in *Copp Paving* (Pet. 24-27). These arguments were properly rejected by both courts below and merit no further review.

In *Copp Paving*, processors of asphalt concrete challenged the activities of asphalt producers and their asphalt concrete processing subsidiaries under the Sherman Act, The Clayton Act and the Robinson-Patman Act. The only evidence of interstate commerce plaintiffs adduced was the fact that some of the roads in the Los Angeles area were part of the interstate highway system, and that a greater than *de minimis* amount of asphaltic concrete was used in their construction and repair. The Ninth Circuit found these allegations sufficient to sustain federal jurisdiction under all three statutes. *In re Western Liquid Asphalt Cases*, 487 F.2d 202 (9th Cir. 1973). This Court reversed the Ninth Circuit as to jurisdiction under the Clayton and Robinson-Patman Acts, but expressly refused to review the Ninth Circuit's finding

city sewer project necessarily resulted in the city having less funds to expend for other projects requiring the purchase of out-of-state goods).

of jurisdiction under the Sherman Act. *Copp Paving*, 419 U.S. at 192-193.¹¹

The district court correctly recognized that this case involves the Sherman Act, not the Clayton and Robinson-Patman Acts, and that *Copp Paving* interpreted the "in commerce" requirement of only the latter two statutes. C.A. App. 61. Since the challenged instructions in this case involve only the "effect on commerce" standard under the Sherman Act, not the "in commerce" test, *Copp Paving* simply does not apply.

Petitioners note (Pet. 21-23), however, that the Court in *Copp Paving*, in dictum, assumed arguendo that the Clayton Act extended "to acquisitions and sales having substantial effects on commerce" (419 U.S. at 202). The Court then observed that plain-

¹¹ This Court explained that while the Sherman Act covers both conduct in or affecting commerce, the other two statutes applied only to conduct in commerce. Thus, the Sherman Act occupies the full breadth of Congress' power to act under the Commerce Clause, while the Clayton and Robinson-Patman Acts were more circumscribed in scope. *Copp Paving*, 419 U.S. at 194-196. The Court simply concluded that Copp Paving had failed to demonstrate that the sale of asphalt concrete to highway contractors was "in commerce" on these facts (419 U.S. at 198):

Copp's "in commerce" argument rests essentially on a purely formal "nexus" to commerce: the highways are instrumentalities of interstate commerce; therefore any conduct of petitioners with respect to an ingredient of a highway is *per se* "in commerce." * * * But whatever merit this categorical inclusion-and-exclusion approach may have when dealing with the language and purposes of other regulatory enactments, it does not carry over to the context of the Robinson-Patman and Clayton Acts.

The Clayton Act has since been amended to reach activities that affect commerce. 15 U.S.C. 18.

tiffs had "presented no evidence of effect on interstate commerce" but had merely relied on a presumption "from the use of asphaltic concrete in interstate highways." *Ibid.*

Here, however, the government did not rely solely on the fact that the roads in question were part of the interstate highway system. Rather, the government placed in evidence a state traffic survey and the testimony of John L. Butner, an employee of the State Highway Department, concerning the movement of out-of-state goods and vehicles over the roads in question. C.A. App. 90-104.¹² Thus, the fact-finders were not asked here, as they were in *Copp Paving*, to "presume" the existence of an effect on interstate commerce. See *Copp Paving*, 419 U.S. at 202. Nothing in *Copp Paving* prevents the government from presenting evidence that roads that were the object of a

¹² That the roads that the conspirators paved carried substantial amounts of interstate traffic is hardly surprising; much recreational traffic, as well as large amounts of commercial traffic bound for Virginia's ports (Hampton Roads, Newport News and Norfolk), shipyards and drydock facilities, use Peninsula roads (C.A. App. 101, 103). Indeed, Butner testified that the highway department's studies indicated that one of the roads involved in the challenged contracts, route five, carried an average of 360 out-of-state cars a day, or well over a million vehicles a year (C.A. App. 116). Moreover, in response to the government's inquiry concerning the "interstate character" of the Virginia highway system (C.A. App. 101), Butner testified that the Virginia highway system was part of a larger, "total transportation network" (C.A. App. 102), used by ordinary citizens (*ibid.*), as well as by businesses (C.A. App. 103), to facilitate the flow of people, goods and services into and out of Virginia (*ibid.*).

bidrigging conspiracy are heavily involved with interstate traffic or precludes the jury from relying on such evidence to reach its verdict.¹³ Nor does *Copp Paving* preclude a court from instructing the jury that such evidence is relevant in determining the interstate commerce element of the offense.¹⁴ Thus, the

¹³ The district court also noted that *Copp Paving* involved unlawful activities by suppliers of roadbuilding materials while the instant case involved the roadbuilders themselves. C.A. App. 62. In *United States v. Allied Asphalt Paving Co.*, 451 F. Supp. 804, 813-814 (N.D. Ill. 1978), bidrigging in the repaving of O'Hare Airport was found to be within the Sherman Act's reach under the "affecting commerce" standard because interstate commerce travels through the airport.

¹⁴ Petitioners suggest (Pet. 20) that the study summarized in Butner's testimony was deficient because it relied on a count of out-of-state license plates rather than actual interviews with drivers to determine which cars were from states other than Virginia. Petitioners also claim that the study was entirely irrelevant to the roads at issue here because it did not state separate figures for the precise stretch of roads petitioners repaved. But no case requires such a massive undertaking; petitioners' ability to conceive of a study that might be more comprehensive or accurate does not render Butner's testimony concerning the study actually undertaken inadmissible, or the jury's inferences unreasonable. See, e.g., *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785, 825 (2d Cir. 1983), petition for cert. pending, No. 82-2128.

Petitioners' attack on this portion of the charge amounts to a claim that, as a matter of law, the movement of interstate traffic is never sufficient to establish jurisdiction under the Sherman Act. *Copp Paving* does not support this position, however, and several courts have found an effect on commerce by reason of the interstate movement of people or goods. See, e.g., *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676, 680 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *United States v. Foley*, 598 F.2d at 1330; *Feminist Women's Health Center v. Mohammad*, 586 F.2d at 540-541.

evidence presented by the government in this case concerning the substantial amounts of interstate traffic on the roads in question was admissible, and the district court's instructions were not improper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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